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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 234

OLIVIA H. HOPKINS, WASHINGTON-BUTTE MINING COMPANY, A CORPORATION, AND ANACONDA COPPER MINING COMPANY, A CORPORATION, APPELLANTS,

vs.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, L. O. CLARK, JOHANNA FARLIN, A. F. BUSHNELL, PATRICK LE ROUX, J. T. FITZGERALD, ELIZABETH BROWN, C. B. NOLAN, W. D. THORNTON, NANCY HOBBS, LOU H. HADWICK, ANNIE STALKER, M. F. CLEARY, E. J. CLEARY, ADOLPH KEPPLER, J. B. WOODS, RACHAEL MERRIMAN, BERTHA McGOWAN, AND ALICE McGOWAN, APPELLEES.

BRIEF OF APPELLEES.

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(File No. 24,900)

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OLIVIA H. HOPKINS, WASHINGTON-BUTTE MINING COMPANY, A CORPORATION, AND ANACONDA COPPER MINING COMPANY, A CORPORATION, APPELLANTS,

vs.

FRANK WALKER, CLINTON C. CLARK, LOUIS MASON, L. O. CLARK, JOHANNA FARLIN, A. F. BUSHNELL, PATRICK LE ROUX, J. T. FITZGERALD, ELIZABETH BROWN, C. B. NOLAN, W. D. THORNTON, NANCY HOBBS, LOU H. HADWICK, ANNIE STALKER, M. F. CLEARY, E. J. CLEARY, ADOLPH KEPPLER, J. B. WOODS, RACHAEL MERRIMAN, BERTHA McGOWAN, AND ALICE McGOWAN, APPELLEES.

BRIEF OF APPELLEES.

I. The Nature of the Law-suit.

This is an appeal from a final decree of the District Court for the District of Montana dismissing a bill for want of jurisdiction. The authority of that court was invoked on the claim that the suit presented a Federal question. The

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averments of the bill are set forth with substantial accuracy in the brief of the appellants. The suit is what is known in the terminology of mining law as a "quartz-placer" action. The controversy arises by reason of the peculiar provisions of the law under which one is permitted to enter upon lands patented as a placer claim and to locate within such claim a lode or lodes known to exist at the time of filing the application for the placer patent. This right is exercised by virtue of the following statute:

> "Where the same person, association, or corporation is in possession of a placer-claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer-claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer-claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer-claim, or any placer-claim not embracing any vein or lode-claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer-claim, an application for a patent for such placer-claim, which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer-claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer-claim is not known, a patent for the placer-claim shall convey all valuable mineral and other deposits within the boundaries thereof."
>
> Sec. 2333, R. S. U. S.

The decisions of this court construing the statute quoted warrant the following comment by a standard writer:

> "The issuance of a placer patent containing within its limits a lode known to exist prior to the patent application, which lode is not claimed and applied

for by the placer claimant as a *lode*, does not cut off the right to appropriate it in hostility to the patentee. His failure to include it in his placer application is a conclusive declaration that he has no right to it."

Lindley on Mines, 413 (3d ed.).

Such a lode is open to appropriation as though it were discovered on the general public domain. In order to effect an appropriation, to "make a location" of such a lode, there are two requisites prescribed by the Federal statute, and only two, namely:

(1) The discovery.

(2) The marking of the location on the ground so that its boundaries can be readily traced.

Lindley, 328.

It is contemplated, however, by the congressional act that additional requirements might be imposed by the local authorities, among others the making and filing of a notice or certificate of location,

R. S. U. S., 2324,

and the validity of legislation of that character has been affirmed by this court.

Butte City Water Company *vs.* Baker, 196 U. S., 119.

From the territorial days even local statutes have been in force in Montana prescribing formalities to be observed and acts to be done in order to make a "location" of a lode claim, a record being an essential step always, but only one of a series of acts the performance of which operated to give proprietary rights to the locator. During the period important here—from 1900 to 1913, inclusive—the law of Montana underwent some unimportant changes, but in general its requirements were in conformity with those of the statutes of the other mining States. The statutes in question are thus summarized by Lindley:

"Generally speaking, under the laws of Congress as well as under State laws and local rules the natural and proper order of procedure to complete a location are: (1) discovery, (2) posting notice, (3) recording notice, (4) marking boundaries, (5) development work; but the order in which the several acts required by law are to be performed is non-essential, in the absence of intervening rights.

"The marking of the boundaries may precede the discovery, or the discovery may precede the marking; and if both are completed before the rights of others intervene, the earlier act will inure to the benefit of the locator."

Lindley on Mines, 330 (3d ed.).

The order prescribed by the Montana statute is as follows: (1) discovery; (2) posting notice; (3) marking boundaries; (4) development work or discovery work; (5) recording notice. For the further information of the court the statute as it appears in the Revised Codes of 1907 is set out as an appendix hereto.

The jurisdiction of the Federal court in this action is asserted upon the claim that it is a suit to remove as clouds upon the title of complainants, nine certificates of location covering portions of the land embraced within their placer patent reciting the discovery of a lode within it.

A proper comprehension of the question presented by this record cannot be secured without an accurate understanding of the nature and purpose of these certificates. An ordinary conveyance transmits the title of land from one to another. Title to public land is not transmitted by a certificate of location. It is, as has been pointed out, one of the steps by which the title passes, and not the most important one. "Discovery is the most important of all acts required in the proceedings culminating in a perfected location."

Lindley, 392.

The next step made indispensable by the Federal statute is that "the location must be distinctly marked on the ground,

so that its boundaries can be readily traced." The local law may exact more, as the posting of a notice or the doing of a definite amount of work, that the discovery may be freed from needless doubt.

> "The real purpose of the record is to operate as constructive notice of the fact of an asserted *claim* and its extent."
>
> Lindley, 392.

It thus protects the locator against the assertion of a claim by one who makes a subsequent discovery, and though essential to a perfected location, as the term is ordinarily understood, a patent will be issued to a locator though he never filed a notice, in the absence of a claim by a third party.

Section 2332, R. S. U. S.

But the discovery is the indispensably essential thing, and the claim must be marked on the ground. "A location certificate is but one step, the last one, in the location of a mining claim."

> Secretary Smith in Etling *vs.* Potter, 17 L. D., 424-426, quoted in Mining Co. *vs.* Tunnel Co., 196 U. S., 337-349.

It does not, of itself, constitute title nor the possessory right to the mining ground.

> "It must be remembered that the discovery and marking on the ground are not matters of record, but *in pais*, and if disputed in an adverse suit or otherwise must be shown, as other like facts, by parol testimony."
>
> Mining Co. *vs.* Tunnel Co., *supra*.

> "When the locator's right is challenged, he should be compelled to establish by proof outside of the certificate all the essential facts, without the existence of which the certificate possesses no potential validity. These facts once proved, the recorded certificate may

be considered as *prima facie* evidence of such other facts as are required to be stated therein, which is, of course, subject to contradiction."

Lindley, 392.

It will be noted that the Montana statute makes the certificate *"prima facie* evidence of all facts properly recited therein," but the fact of discovery is not one that it is essential the notice shall recite, and consequently that fact must be proven by evidence *aliunde*.

Flick *vs.* Gold Hill & L. M. Co., 8 Mont., 298.

"While many of the States require the date of the discovery (ordinarily of the *location*) to be stated in the recorded certificate, this would not be evidence of the *fact* of discovery."

Lindley, 392.

Moreover, the discovery must appear to have been made upon "the public domain," to use the language of the Montana statute. The certificate is not evidence that the land claimed is a part of the public domain. In the case before us the contention is made that the land claimed is a part of a tract to which the Government has passed the title to the appellants by virtue of the placer patent. The lode claimants can prevail in a contest against appellants only by showing that what appears to have been granted to them was not, in fact, because at the time of the application for the placer patent there was within the area covered by it a "known lode," which consequently remained a part of the public domain. The certificate is valueless unless supplemented by parol proof not only that a discovery was made as a foundation for the location which it recites, but also that such discovery was on a lode known to exist at the time the application for the placer patent was filed.

"The burden of proving the existence of a 'known lode' rests with the lode claimants."

Lindley, 781, p. 1914.

> "Where the lode was located subsequent to the filing of the placer application, based upon an assertion that its existence was known at the time of such filing, the party seeking to establish that it is within the exception of the placer patent must bring himself clearly within the rule enunciated by the Supreme Court of the United States, viz., that in order to meet the designation of 'known vein,' such vein or lode must have been, at the date of the placer application, clearly ascertained and known to be of such extent as to render the land more valuable on that account, and justify its exploitation; and its existence and quality must have been known to the applicant for the placer patent or known to the community generally,—from which knowledge by the applicant might be inferred,—or else disclosed by workings, and obvious to any one making a reasonable and fair inspection of the premises for the purpose of obtaining title from the Government."
>
> Lindley, 781, p. 1913.

So much has been said in advance in order to exhibit to such of the members of the court as may not be familiar with the intricacies of a quartz-placer controversy the supreme importance, in suits involving such, of proof of facts which must be made by the testimony of witnesses and the relative unimportance of the certificate of location.

It is to annul and cancel a number of such certificates, as heretofore stated, upon the ground that there was no known lode within the area covered by the appellants' patent at the time the application for it was filed, that this suit is brought.

II. What Are the Necessary Averments of a Bill Seeking the Relief Asked?

It is asserted that the action is one to clear clouds upon title, presenting a Federal question.

The rule is recognized by the appellants that in order to invoke the Federal jurisdiction it must appear from the bill

that the construction of an act of Congress is involved, and likewise that in the statement of the case on the part of the complainants it is not permissible to anticipate what claim may be made by way of defense for the purpose of bringing into the case a Federal question or showing that the determination of the controversy depends upon such.

It is claimed, however, that the present suit does not fall under the ban of this well-established rule, because of its peculiar character—an action not to quiet title, but to clear cloud from title, in which it is permissible for, and even required of the complainant that he set out: (1) his own title; (2) the instrument constituting the cloud, and (3) the facts which show the invalidity of or want of force in such instrument.

This the appellants say is what they have done and all they have done.

It is admitted that in an action in ejectment the plaintiff is required only to allege in general terms his title and the ouster. He may not, for the purpose of invoking the Federal jurisdiction, plead that the defendant claims to be entitled to the premises by reason of certain facts, in consequence of which, should they appear, the rights of the parties will depend upon the construction which should be given to an act of Congress.

Taylor *vs.* Anderson, 234 U. S., 74.

It seems likewise to be admitted that in an ordinary action to quiet title, the complainant being required only to set out his own title and that the defendant claims some right adverse to him, he may not supplement such averments with others in which are detailed the facts claimed by such party to give him the right which he professes to have, and that a Federal question so appearing does not confer jurisdiction upon a national court. But it is insisted that an action to clear cloud from title is essentially different in character and warrants averments concerning the claims made by the

defendant pursuant to which the instrument to procure the annulment of which is the purpose for which the suit is brought is filed.

Devine *vs.* Los Angeles, 202 U. S., 313.

Montana has long had one of the modern statutes authorizing suits to quiet title. It is as follows:

> "An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."
>
> Section 6870, Revised Codes of Montana, 1907.

The adjudications are uniform that under statutes in substance like that quoted—and in the Federal court in which it may be invoked as well as in the State court—it is enough to aver in general terms the title of the plaintiff and in equally general language that the defendant asserts some title adverse to him.

See cases cited in Devine *vs.* Los Angeles, *supra.*
Merk *vs.* Bowery Mining Co., 31 Mont., 298-309.
Pollock *vs.* Davenport, 31 Mont., 452.
Ely *vs.* New Mexico, etc., R. Co., 129 U. S., 291.

Such a pleading warrants a decree quieting the title of the plaintiff against any claims of the defendant of any nature whatever, enjoining and restraining him from asserting any claim whatever to the premises and adjudging as null any and all instruments purporting to show title in him.

15 Ency. of Forms, 205.

The bill in this case contains all the averments requisite in a complaint in an action under the Montana statute. It avers ownership of the premises in controversy in the complainants; it sets up the claims asserted by the defendants adverse to the complainants, and asserts "that said defendants have not and none of them has any right, title, or inter-

est, either at law or in equity, in or to the said land or any part thereof." It prays not only for general relief—that is, any relief appropriate to the case made by the bill which would justify a decree in scope as above indicated—but asks further that "the title of the complainants herein be quieted," not as against the specific claims referred to in the bill, but *quieted*—that is, quieted against any claims that might be asserted by the defendants. They ask specific relief, it is true, touching the certificates of location, namely, "that the cloud caused by the recording of the said declaratory statements of location and certificates of location in the office of the county clerk and recorder of Silver Bow County, Montana, and each and all of them be removed and the same decreed to be no cloud upon the title of the complainants." But how is the court to proceed to "remove" these certificates from the record, and, as for adjudging that they are no cloud, how does a recital to that effect in the decree add to the force of a sweeping adjudication that the defendants have no right, title, or interest in the premises?

The suit is to all intents and purposes one, or the equivalent of one, brought under the statute with some superfluous allegations setting out in detail the nature of the claims asserted by the appellees, with a recital of conditions by reason of which the appellants assert the appellees have no title.

If this is not the true view to take of the pleading, it is true that the complainants might have contented themselves with making a general averment of title, such as appears in the bill, referring, if they cared to do so, to the patent as its source, and a like general averment of the assertion of an adverse claim by the defendants and praying generally that title be quieted in complainants; that defendants be adjudged to have no interest; that they be enjoined from asserting *any* claim, and that any and all instruments of record or otherwise purporting to show title in them be adjudged null. Such a bill would call for an answer, in which each defend-

ant would be required to set up the facts claimed by him to entitle him to "locate," namely, the existence of a "known vein" within the placer patent, and the various steps by which he appropriated the same, discovery, marking boundary, posting, development work, and recording notice. The complainants' replication would put all these facts in issue and, prevailing upon the final hearing, they would have a decree such as is above suggested with a specific reference, if desired (which, however, would add nothing to either its efficacy or its scope) to the notices of location, the filing of which was the culminating act in the case of each defendant in his effort to acquire title.

It may be conceded, as is contended by appellants, that in an action to remove cloud from title, independent of the statute, the complainant is required to set out his own title, the particular instrument which he seeks to have "removed," and the facts in consequence of which the document which apparently invests the defendant with title does not have that effect. It is perhaps equally true that a bill of complaint to remove cloud from title, good as against a demurrer prior to the statute, is still equally invulnerable. All this is beside the question, which is whether a suitor may, in order to invoke the Federal jurisdiction, elect to draft his pleading in a more detailed way than he is required to, narrowing the relief to which he is entitled to a decree against a specific claim or specific claims, and one or more specific instruments evidencing the same, instead of a judgment quieting his title against any and all claims of whatever nature that may be asserted by the defendants.

It is obvious that whichever form is pursued in the drafting of the initial pleading, the lawsuit will run the same course. In either case the contested issue will be whether there was within the area patented as a placer claim a "known lode" at the time the application for patent was filed.

This court has repeatedly said that in order to call the

national court into action the Federal question must *"necessarily"* appear from the "plaintiff's statement of *his own claim* in the bill."

Taylor *vs.* Anderson, 234 U. S., 74.
Denver *vs.* N. Y. Trust Co., 229 U. S., 123-133.
Third Street & S. Ry. Co. *vs.* Lewis, 173 U. S., 457.

Even if it be admitted that it is *permissible* in the complainants to make the specific averments found in the bill, they are under no *necessity* to do so in order to get the full relief to which they are entitled.

The appellants assume that there is no kinship between the statute and a suit to remove cloud from title. They associate it alone with the equity jurisdiction to quiet title and argue that the remedy always administered by courts of equity, the removal of cloud from title, remains unimpaired, and they insist, with much vigor, that State statutes cannot abridge the equity powers of the Federal court. The statute does not abridge, but enlarges, the equity powers of the Federal court in the matter of clouds upon title, not by augmenting their jurisdiction, but by creating new rights or, rather, by extending existing rights. It is quite commonly understood that the statute gives the right to maintain suits to quiet title under conditions which, under the practice of equity courts prior to the statute, would not lie. The suit to quiet title, as it was developed by the court of chancery, was prosecuted to arrest repeated vexatious trials in actions of ejectment. It was maintainable, likewise, in another class of cases, unimportant for the purpose of this discussion, "for the purpose of establishing a general right between a single party and numerous persons claiming distinct and individual interests."

Boston & M. Co. *vs.* Montana Ore Pur. Co., 188 U. S., 632-641.

In the class of cases first mentioned it was necessary that the complainant aver that his title had been established by

at least one successful trial at law before equity would entertain jurisdiction.

Id.

The statute, however, gave to the party in possession—every party, whether he had or had not established his right in an action at law—the right to call his adversary into a court of equity to obtain an adjudication of the controversy as to the title, which should forever determine it, and to secure, as appropriate relief, an injunction against the defendant forbidding the further assertion of title on his part.

Now, while it may be that a suitor is entitled to plead, as of old, that his title has been successfully defended or asserted in an action at law, he is not required to make any such allegation, and indisputably he could not, by doing so, invoke the jurisdiction of a Federal court.

And so with the action to remove cloud from title. Embarrassments of a most serious character were suffered by parties whose titles were affected by adverse rights. Equity would not take jurisdiction to remove as a cloud upon title an instrument the invalidity of which appeared upon its face, if it was invalid at all, the rival claims of the parties depending possibly upon the most obscure questions of law. Pomeroy's assault upon this limitation upon the right of the court to remove cloud from title is well known.

4 Pomeroy, 1399 (3d ed.).

It was so persuasive in character that some courts refused to recognize the ancient rule, and even in the absence of a statute ventured to "remove" from the record instruments void on their face because of the embarrassments they occasioned to the owner in any attempt he might make to sell.

Under such statutes as that of Montana quoted above it is immaterial whether the invalidity of the instrument appears upon its face or must be shown by evidence *aliunde;* the court can render judgment declaring it null and enjoining

the assertion of title under it. It was one of the purposes of the statute to meet the condition adverted to. It enlarged the cases in which a court of equity could award a decree clearing cloud from title as well as the cases in which equity would quiet title. Such was the significance given to an early statute of the character of those being considered of the State of Kentucky in

Clark *vs.* Smith, 13 Pet., 195.

The language of the court to which reference is made is quoted in the opinion in

Holland *vs.* Challen, 110 U. S., 15-22, 23.

In

Fox *vs.* Williams, 92 Wis., 320,

the court recognized the rule that equity would not cancel as a cloud upon title an instrument void on its face, but it at the same time declared that the statute had changed this and it adjudged accordingly, the court expressing itself to the effect that the statute extends to an instrument not even apparently a cloud upon the title, but which is capable of being used to affect the title injuriously. Similar comment touching the character of actions warranted by the statute is made in

Head *vs.* Fordyce, 17 Cal., 149.
Maxon *vs.* Ayres, 28 Wis., 612, and
Dean *vs.* Madison, 9 Wis., 402.

A deed void on its face was made the basis of the action in

Reynolds *vs.* Crawfordsville, 112 U. S., 405,

in which the statute was treated as enlarging the remedy of removing a cloud, all of which justifies the following from 17 Ency. of Pl. & Pr., 290, viz:

> "The general purpose and effect of these statutes is to extend the remedy to cases in which, by the settled

> rules of equity, no relief could be had either because the adverse claim is not such as to constitute a technical cloud or because the plaintiff is not in a situation to invoke the equitable jurisdiction."

In view of the statute, it is not now necessary in a suit to quiet title to aver that the complainant's title has been settled in an action at law, since he is entitled to maintain the proceeding, whether it has or has not been. In the same way it is not necessary, in an action, the purpose of which is to clear cloud from title, to set out the character of the instrument in order that the court may see whether on its face it purports to give title or that it is *prima facie* valid. Equity will "remove" it, whether it is valid on its face or not.

It is not even necessary that it should appear that the claim which the defendant makes is founded on a written instrument. Having in mind only the old procedure, it was quite proper to say:

> "A bill will not lie to remove a mere verbal claim or oral assertion of ownership in property as a cloud upon the title."
>
> 6 Ency. of Am. & Eng. Law, 151.
> Devine *vs.* Los Angeles, 202 U. S., 334-5.

But under the new dispensation any claim—a claim of right arising by adverse possession or by a lost instrument—will evoke the equity powers of the court.

The right has been so enlarged and extended by the statute that it is no longer necessary to descend into detail in the pleading in order that the court may know that the claim on the validity of which it is to pass, is a certain particular kind of claim.

The pleading need not be so specific, because the limitations on the right have been removed. If a statute makes the sale of intoxicating liquors under certain conditions, at certain places and in certain quantities, criminal, an indictment must charge that the sale was made under the condi-

tions laid down in the act, at a place such as is therein specified, and in the quantity which it forbids. If the statute is amended so as to make it penal to sell such at all, it will suffice to aver simply that the defendant sold at some place within the jurisdiction of the court.

The suit to quiet title and the suit to remove cloud from title were always so closely related in character that they are almost invariably treated of together, usually under a common title, by the commentators. By the operation of the statute they have all but coalesced. As expressed by the learned district judge: "Under modern statutory enactments the distinction has little more than an historical interest."

To repeat: It may have been *permissible* in the appellants to plead in detail as they did; it was not *necessary* for them to do so. It was, accordingly, held in a case very like this that the Federal jurisdiction could not be invoked by superfluous averments.

California O. & G. Co. *vs.* Miller, 96 Fed., 12.

III. Is a Federal Question Raised Aside from the Propriety of the Pleading?

(*a*) *Title Not Made by the Certificate.*

But if it be admitted that a Federal question may be raised by electing to plead, as required by the old system, by denying one's self the more comprehensive relief which the statute affords, and asking only an adjudication on the validity of the particular instrument attacked, is a case made which calls into action the national court?

As pointed out heretofore, the real controversy between the parties is not over the validity of an instrument by which title is conveyed. The meat of the matter is whether there was a "known lode" within the patented area at the time the application was filed in the land office. If that essential and basic fact is established, then the inquiry proceeds to ascer-

tain whether the various steps constituting a "location" were followed, including the filing of the notice or certificate attacked. That instrument is not a conveyance by which title passes, apparently, as in the case of a forged deed, a tax deed, a deed executed under a power of attorney after the death of the donor of the power, a deed recorded but never delivered, a sheriff's deed issued upon a sale under a judgment satisfied but not discharged of record. In all these cases title would be made by the introduction of the deed, which under modern statutes, if recorded, would prove itself. A claimant under one of the certificates attacked here would have made practically no progress at all in an action of ejectment by the introduction of his certificate of location. Its authenticity would, doubtless, pass unquestioned. The real struggle would not yet have begun. Indeed, in the logical order, the certificate ought not to be admitted until by extraneous evidence the fact of the existence of the known lode and the discovery are shown, and when they are shown the right of the plaintiff rests primarily upon them and not upon the location certificate. In order to recover, the lode claimant *must* introduce parol evidence, either before or after the admission of the certificate. So in an action brought by the placer patentee under the statute to establish his title, he may introduce his patent and rest. As shown above, the burden is on the lode claimant to establish the existence of a known lode. The certificate is utterly useless to him until proof is made of that fact and of his discovery, at least. An interesting inquiry is here suggested. A plain, simple route is open to a placer patentee to try the validity of a certificate of location by availing himself of the rights flowing from the statute. If he may elect not to do so, but has the right to frame his pleading more elaborately, as was requisite before the statute, must he take upon himself a like burden as to the proof? Must he *prove* the *averment* of the bill, that there was no known lode within the patented area at the time the application was filed, or may he content himself with the

case made when his patent is introduced, as he could in an action founded on the statute? Will not the case proceed in exactly the same way? Will not the questions at issue be identical? Will not the burden of proof be upon the same party, whether the pleading is framed in conformity with the statute or professedly in accordance with the ancient practice? This is a diversion more appropriate to the aspect of the case now passed, as to whether the complainants gain any rights by ignoring, if they do ignore, the statute.

The lode claimants, should they sue at law, could not recover on their certificates alone; neither could they successfully defend. They must introduce evidence. If the bill of complaint is truthful, they must fail because there was no known lode. The appellants insist that for the purposes of the case the statute must be disregarded. They are proceeding, they say, under the equity practice, regardless of statutory enactments. If so, they must make a case under that practice. One of the rules governing suits to remove cloud upon title is that if the party claiming under the instrument asserted to be a cloud would be obliged, in an attempt to make out his case, in an action brought by him to secure possession, to submit evidence which would show the instrument to be invalid or ineffective, it will not be canceled as a cloud. In such an action it would appear either that there was or that there was not a known lode. If it would be developed that there was not, equity will not remove the cloud for the reason stated. If it would appear that there was such a lode, equity certainly, in an action by the placer patentee, would not annihilate the location notice. But the rule goes farther than as indicated above. It is more accurately stated in the following excerpt:

> "Equity will not interfere to remove a cloud on title where the invalidity of the instrument or claim complained of appears on its face; *where extrinsic facts must be proved for the purpose of establishing its validity;* or where the party claiming under it must,

> in order to recover thereon, necessarily offer evidence inevitably showing its invalidity and destroying its effect."
>
> 32 Cyc., 1315.

Note that the second condition expressed in the rule as announced above is that when the claimant is obliged to go beyond the instrument in question and make proof of facts, aside from those bearing on its authenticity, to establish conditions in the light of which alone, in conjunction with the instrument, title can be asserted, equity will not interfere. The language is that of the Court of Appeals in

Lehman *vs.* Roberts, 86 N. Y., 232-239.

A tax deed, given character by a statute making it *prima facie* evidence of the regularity of all prior proceedings, constitutes a cloud on title. But equity will not interfere when in the absence of such a statute the claimant is obliged to show not only the deed but the strict observance of all antecedent proceedings.

The same idea was expressed by the court last above referred to in

Scott *vs.* Onderdonk, 14 N. Y., 9-14,

in the opinion in which, after stating that equity would not entertain a suit to cancel a deed void on its face, added:

> "The same reason applies to cases where the claim requires the existence of a series of facts or the performance of a succession of legal acts, and there is a defect as to one or more of the links. The party must, in general, wait until the pretended title is asserted. This principle is very well settled by authority (citing cases). In both classes of cases the party whose estate is questioned may naturally wish to have the matter speedily determined, as he may, in the meantime, suffer inconveniences and even damage on account of the discredit attaching to his title by reason of the unfounded claim. But unless the circumstances are such as to sustain an action for slander

of title, the law regards the injury as too speculative to warrant its interference."

> "It has been held in some cases (says Cooley) that if the purchaser at a tax sale must take upon himself the burden of showing the regularity of the proceedings so that the deed itself is not *prima facie* evidence of title, the owner of the record title was sufficiently protected in this rule of law, and a bill in equity would not lie on his behalf to remove the lien of the tax, or set aside the deed after a sale."
>
> 2 Cooley on Taxation, 1451-2 (3d ed.).

If the averments of the bill of complaint be true the lode claimant must inevitably fail in an effort to make title in an action at law. If they be untrue, and the placer patentee did not get title to all the land included in his patent because there was within it a known lode, which his adversary located, there ought to be no decree giving complainants title to the whole, as they ask.

(*b*) *As to Excess Width, the Alleged Defect Appears on the Face of the Certificates.*

But the difficulties do not cease here. Whether there was a known lode or not is a pure question of fact. So far as that feature of the case is concerned, no Federal question is presented. The appellants' counsel are too learned in the law to assert that there is, though the rights of the appellees rest upon the placer-patent statute quoted.

> "3. A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under these laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central

> and western States would so arise, as all titles in those States are traceable back to those laws."
> Shulthis *vs.* McDougal, 225 U. S., 561-569.

To make a case which "involves a dispute or controversy respecting the validity, construction or effect of such a law" it is advanced that the appellees claim that a location may be made of a known lode within a placer patent 1,500 feet in length by 600 feet in width, and that the pretended locations were made in extent to conform to such idea, while under the true construction of the statute they could not have a width greater than 25 feet on each side of the center of the vein. But whatever difference of opinion may exist, either in the courts or before the Department, upon this interesting question, such infirmity as there may be in the certificates in question, because the claims were located 600 feet in width instead of 50, appears upon the face of the instruments. And under perfectly well-established rules equity will not interfere in such a case.

(c) *Partial Invalidity of Certificates Will Not Warrant Relief Appropriate to Suit to Clear Cloud.*

Perhaps it is not claimed that the certificates are void *in toto* because the claim was marked on the ground too wide, but only that it is void or ineffective as to the excess. This was apparently the view of the district court in the case referred to in appellants' brief,

> South Butte M'n'g Co. *vs.* B. & V. M. Co. (not reported),

and it is in conformity with the decisions of the courts generally touching locations excessive in area, at least when they are made in good faith.

2 Lindley, 362.

But whatever be the claim, the alleged defect or irregularity is apparent on the face of the certificates.

Cancellation is the appropriate remedy in an action to clear cloud from title.

Hicks *vs.* Rupp, 140 Pac., 97 (Mont.).

The court cannot partially cancel a conveyance, nor can it partially remove the certificates in question from the record. It is a settled principle that a suit cannot be maintained to remove as a cloud from title an instrument valid in part and void in part.

Latham *vs.* Inman, 88 Ga., 505.

Prospect Park *vs.* Morey, 140 N. Y. Supp., 380.

The complainants might maintain an action under the statute to quiet their title to all the ground embraced in the location beyond the limit of twenty-five feet from the center of the vein and to so much of it as, in length, is not supported by an exposed vein. But a bill to remove the certificate from the record or to obtain the cancellation of the original, obviously cannot be sustained.

(*d*) *Alleged Estoppel Raising Federal Question.*

The facts relied upon as an estoppel are, however, it is insisted, properly pleaded, and out of them a Federal question is said to arise. As the question presented by this aspect of the case has been decided adversely to the contention of appellants by this court, it is unnecessary to dwell upon the merit of the pleading as such. The bill avers that the placer claimants having filed their application for patent, adverse claims were interposed by parties claiming to be the owners of two lode claims within the area for which the placer patent was asked, the Point Pleasant and the Pleasant View; that pursuant to the statute they instituted actions to establish their right to the ground in controversy, which

eventuated in favor of the placer claimants, to whom patent was awarded in due course upon the filing in the Land Office of the appropriate proof of the result of such actions. No privity exists between the plaintiff in either of those actions and the appellees here, except it be because of the construction which the appellants ask shall be given to the statute authorizing the institution of suits to try the rival claims respecting the right of possession to mining ground when application for patent to the same is made.

Sec. 2326, R. S. U. S.

It is advanced, however, that, though not named as such, the United States is in effect a party to any suit brought under that section; that the judgment determined that the land—and all of it—was placer in character and that there was not within it any lode; that, whether such conclusion was sound or unsound, the Government is precluded from asserting the contrary, and that the appellees, claiming title under the United States by virtue of an appropriation made later, are equally estopped to assert that there was within the area patented as placer, a "known lode." The judgment must be given this effect, it is claimed, because of language in the act (sec. 2326, *supra*) said to be open to the construction which the appellants ask be given it.

If the proposition were a debatable one a Federal question might be presented; but it isn't. It was decided adversely to the contention of the appellants in

Clipper M. Co. *vs.* Eli M. & L. Co., 194 U. S., 220-232, 233.

It is in that case held that the adverse action determines nothing as against the United States except as to which of the parties, as between each other, is entitled to the ground. The Government is in no sense concluded by the lawsuit as to the character of the land or any part of it. The land officers are still required to satisfy themselves that the ground

is of the character contemplated in the law under which the claimant seeks to acquire it, and that he is otherwise entitled to the patent. The relation of the Government to the land is exactly what it would have been had there never been an adverse claim filed or a suit brought to effectuate it.

This court considered the statute in question in

Perego *vs.* Dodge, 163 U. S., 160-168,

in the opinion in which it is said:

> "It must be remembered that it is 'the question of the right of possession' which is to be determined by the courts, and that *the United States is not a party to the proceedings.* The only jurisdiction which the courts have is of a controversy between individual claimants, and *it has not been provided that the rights of an applicant for public lands as against the Government* may be determined by the courts in a suit against the latter. United States *vs.* Jones, 131 U. S., 1; Last Chance Mining Company *vs.* Tyler Mining Company, 157 U. S., 683, 694."

And then the court added:

> "It was held by Mr. Justice Lamar, when Secretary of the Interior, that, notwithstanding the judgment of a court on the question as to the right of possession between two litigants, it still remained for the Land Department to pass on the sufficiency of the proofs, and to ascertain the character of the land and whether the conditions of the law had been complied with in good faith before the Government parted with the title. 4 Land Dec., 314, 316."

The decision by this court in the case first above referred to on this feature was anticipated by the Supreme Court of Montana in

Butte L. & I. Co. *vs.* Merriman, 32 Mont., 402-413,

in which the contention was advanced with respect to these very same lode locations, the Point Pleasant and the Pleasant

View. In the course of its opinion the court, referring to the adverse suits, designated as causes 3620 and 3621, said:

> "Under the pleadings in causes 3620 and 3621 it may be conceded, for the purpose of this decision, that, as between the parties to those actions and their privies, there was an adjudication of that fact. It is also a conceded fact that defendants Merriman and Mason were not parties to either of those actions, and are not claiming under any one who was designated as such. But on behalf of respondents here it is contended that, though not nominally a party, yet, as a matter of fact, the United States Government was actually a party, and as such was bound by the judgment in each of those actions, and, as the only claim of defendants Merriman and Mason is founded upon rights acquired from the Government by virtue of their lode locations, therefore they are in privity with the Government, and likewise bound to the same extent as though actually parties by name."

Concerning the proposition so stated the court continued:

> "But in what sense was the Government a party to either of those suits in the district court? It was not a party plaintiff asserting any right, and it has never consented to be made a defendant and to be sued in the State courts; neither did it intervene to have any supposed right of its own adjudicated. But it is contended that the Government is bound by the judgment in an adverse suit, and Last Chance M. Co. *vs.* Tyler M. Co., 157 U. S., 694; 15 Sup. Ct., 737; 39 L. Ed., 859, is cited in support of this contention. In the course of the opinion in that case it is said: 'An applicant for public lands cannot have his right thereto as against the Government determined by the courts in a suit against the latter. (United States *vs.* Jones, 131 U. S., 1; 9 Sup. Ct., 669; 33 L. Ed., 90.)'"

And then, having considered the statute, its conclusion was announced as follows:

> "To say that, in an adverse suit by A against B, either party can have his claim to a particular piece

of mining ground litigated as against the Government, is to say that one may do by indirection that which he cannot do directly, for it is settled beyond controversy that one may not have his right to public land, as against the Government, determined by the courts in an action against the Government." * * *

"These considerations seem sufficient in determining that the Government is not a party to an adverse suit; and as these defendants, Merriman and Mason, were not parties to either suit (3620 and 3621), and are not in privity with any one who was, it follows, as a matter of course, that they are not concluded by the judgments rendered in those actions."

Lindley tersely states the law in this language:

> "The Government is not a party to the suit and is not bound to issue a patent to a successful litigant. The judgment simply determines the 'right of possession' and not the right to a patent."
>
> 3 Lindley, 765 (p. 1869).

It is unnecessary to refer to the authorities holding that a "Federal question" ceases to be such when it has been decided by this court.

The learned counsel for the appellants sought, in an action presenting another phase of the litigation of which the present suit is a part, to secure approbation for his views on the specific question under consideration from the Circuit Court of Appeals for the Ninth Circuit, but that court declined, saying:

> "It" (the judgment on the adverse suit) "had not the effect to determine that there were not within the ground covered by the placer claim, veins or lodes known to exist at the time of the application for the patent, and it has no bearing upon subsequent locations, the rights whereof depend on the question whether, at the time the placer patent was applied for, there were known veins and lodes such as to be excluded from the grant of the patent."
>
> Mason *vs.* Washington Butte M. Co., 214 Fed., 32.

The views of the courts referred to on this point might not be of much consequence were it not for the fact that they treat the question as one past argument because of the direct ruling of this court.

Judgment in favor of the placer claimants in the adverse suits did not necessarily determine that there was no lode within the area patented, even as between the immediate parties to those proceedings. The plaintiffs therein may have been defeated because of a technical defect in their complaints, because, though a discovery was made, the location was not completed by marking the boundaries as required by the statute, or because no location notice was filed or was filed too late, or because it was fatally defective. Many of these suits have failed because the location certificate did not meet the requirements of the law. It may be that it appeared that a perfect location was made, but that it was abandoned or forfeited for failure to perform the annual labor required by the statute.

The bill in this case does not advise the court that the question of the existence of a lode within the placer was actually determined in either adverse suit.

So far as the right of the lode claimants to the Point Pleasant or Pleasant View lodes is concerned, it is immaterial upon what ground the judgment went. Every question which might have been litigated is concluded against them so far as those particular claims are concerned. But when the judgment is offered in evidence in another suit, based upon another claim as conclusive upon any of the questions at issue in the latter, it is evidence only upon the matters actually litigated and determined.

The decisions of this court permit no further discussion of that subject.

Dennison *vs.* U. S., 168 U. S., 241-249.

It received elaborate consideration from the court in Cromwell *vs.* County of Sac, 94 U. S., 351.

There is no longer any dissent from the rule expressed thus by a standard writer:

> "Where a second action between the same parties is upon a claim or demand different from that involved in the first action, the judgment in such first action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered; it is not conclusive as to other matters which might have been, but were not litigated."
>
> 2 Black on Judgments, 609 (page 926).

The appellants encounter a whole line of decisions by this court before they can present the question as to whether the Government was an adversary party in the suits antecedent to patent.

The suit was properly dismissed.

Respectfully submitted,

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APPENDIX.

SEC. 2283. LOCATION OF MINING CLAIMS—DISCOVERY NOTICE, MARKING BOUNDARIES.—Any person who discovers upon the public domain of the United States, within the State of Montana, a vein, lode or ledge of rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, or a placer deposit of gold, or other deposit of minerals having a commercial value which is subject to entry and patent under the mining laws of the United States, may, if qualified by the laws of the United States, locate a mining claim upon such vein, lode, ledge, or deposit, in the following manner, viz:

1. He shall post, conspicuously, at the point of discovery a written or printed notice of location, containing the name of the claim, the name of the locator, (or locators, if there be more than one,) the date of the location, which shall be the date of posting such notice, and the approximate dimension of area of the claim intended to be appropriated.

2. Within thirty days after posting the notice of location he shall distinctly mark the location of the ground so that its boundaries can be readily traced. It shall be *prima facie* evidence that the location is properly marked if the boundaries are defined by a monument at each corner or angle of the claim, consisting of any one of the following kinds: (1) A tree at least eight inches in diameter and blazed on four sides. (2) A post at least four inches square by four feet six inches in length, set one foot in the ground, unless solid rock should occur at a less depth, in which case the post should be set upon such rock, and surrounded in all cases by a mound of earth or stone at least four feet in diameter by two feet in height. A squared stump of the requisite size, surrounded by such mound, shall be deemed the equivalent of a post and mound. (3) A stone at least six inches square by eighteen inches in length, set two-thirds of its

length in the ground, with a mound of earth or stone alongside at least four feet in diameter by two feet in height, or (4) a boulder at least three feet above the natural surface of the ground on the upper side. Where other monuments or monuments of lesser dimensions than those above described are used, it shall be a question for the jury, or for the court where the action is tried without a jury, as to whether the location has been marked upon the ground so that its boundaries can be readily traced. Whatever monument is used, it must be marked with the name of the claim and the designation of the corner either by number or cardinal point.

3. Within sixty days after posting such notice he shall sink a shaft upon the vein, lode or deposit at or near the point of discovery, to be known as the discovery shaft. Such shaft shall be sunk to the depth of at least ten feet vertically below the lowest part of the rim of such shaft at the surface or deeper if necessary to disclose the vein or deposit located, and the cubical contents of such shaft shall not be less than one hundred and fifty cubic feet: *Provided*, That any cut or tunnel which shall disclose the vein, lode or deposit located at a vertical depth of at least ten feet below the natural surface of the ground and which constitutes at least one hundred and fifty cubic feet of excavation, shall be deemed the equivalent of such shaft: *And provided also*, That, where the vein, lode or deposit located is disclosed at a less vertical depth than ten feet, any deficiency in the depth of the discovery shaft, cut or tunnel may be compensated for by any horizontal extension of such working, or by any excavation done elsewhere upon the claim, equaling, in cubical contents, the cubical extent of such deficiency; but in every case at least seventy-five cubic feet of excavation shall be made at the point of discovery.

SEC. 2284. RECORD OF CERTIFICATE OF LOCATION.—Within sixty days after posting the notice of location and for the purpose of constituting constructive notice of the

location, the locator shall record his location in the office of the county clerk of the county in which such mining claim is situated. Such record shall consist of a certificate of location containing:

(1) The name of the lode or claim.

(2) The name of the locator or locators, if there be more than one.

(3) The date of location and such description of said claim, with reference to some natural object or permanent monument, as will identify the claim.

(4) In the case of a lode claim, the direction and distance claimed along the course of the vein each way from the discovery shaft, cut or tunnel, with the width claimed on each side of the center of the vein.

(5) In the case of a placer claim, the dimensions or area of the claim, and the location thereon on the discovery shaft, cut or tunnel.

(6) The locator and claimant, at his option, may also set forth, in such certificate of location, a description of the discovery work, the corner monuments and the markings thereon, and any other facts showing a compliance with the provisions of this law. Such certificate of location must be verified, before some officer authorized to administer oaths, by the locator, or one of the locators, if there be more than one, or by authorized agent. In the case of a corporation, the verification may be made by an officer thereof or by an authorized agent. When the verification is made by an agent, the fact of the agency shall be stated in the affidavit. A certificate of location so verified, or a certified copy thereof, is *prima facie* evidence of all facts properly recited therein.

Revised Codes of Montana (1907), secs. 2283 and 2284.